SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-325

IN RE: GRAND JURY INVESTIGATION
SUSAN ROVNER, *a Witness*,
SUSAN ROVNER,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DONALD J. GOLDBERG
Counsel for Petitioner

1420 Two Girard Plaza
Philadelphia, Pa. 19102

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

IN RE: GRAND JURY INVESTIGATION
SUSAN ROVNER, *a Witness,*
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the District Court is unreported but is printed in Appendix A hereto at p. 7. The opinion of the United States Court of Appeals for the Third Circuit is reported at — F.2d — (3 Cir. 1974), and is printed in Appendix C hereto at p. 10.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1974 (App. C, p. 10). A timely petition for rehearing was denied on August 27, 1974 (App. D, p. 12). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does not the marital privilege protect a wife from being judicially compelled to furnish handwriting samples for use by a federal grand jury in an investigation directed against her husband?

STATEMENT OF THE CASE

Susan Rovner was subpoenaed to testify before a federal grand jury. She appeared as requested, was informed by government counsel that her husband was the subject of the grand jury's investigation, and was asked to provide samples of her handwriting and handprinting to assist the grand jury in its investigation of her husband. She declined to do so and relied for her refusal upon her marital privilege not to testify or furnish evidence in any form.

The United States Attorney then asked the district court to order Mrs. Rovner to provide the handwriting exemplars. The district court found the marital privilege inapplicable (App. A, p. 7), ordered Mrs. Rovner to supply the requested samples and when she persisted in her refusal to furnish evidence against her husband, ordered that she show cause why she should not be held in civil contempt. In the enforcement proceeding which followed, it was stipulated that Susan Rovner was Robert Rovner's wife and that the samples of her handwriting were being sought by the grand jury in an investigation which was directed against her husband.

Mrs. Rovner was held in civil contempt and ordered committed to the custody of the United States Marshal until such time as she purged herself by submitting and furnishing samples of her handwriting and handprinting (App. B, p. 9). The Third Circuit of Appeals affirmed the judgment of the District Court for the Eastern District of Pennsylvania. This petition followed.

REASONS FOR GRANTING THE WRIT

The question raised is one of first impression and of exceptional importance, and its resolution below appears to be in conflict with the reasoning of this Court in *Hawkins v. United States*, 358 U.S. 74 (1958).

No one considers that Mrs. Rovner could have been required to respond to questions before the grand jury which might lead to her husband's indictment. The issue is whether she can be required to give the grand jury samples of her handwriting which might lead to the same end. *Hawkins* established for the federal courts the continued validity of the common law rule which bars the testimony of one spouse against the other unless both consent. Speaking for this Court, Mr. Justice Black made plain the rationale of the rule:

> "The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now . . . Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." *Id.* at 77-78.

The *Hawkins* decision did acknowledge certain exceptions to the rule, but the limited nature of these exceptions convinced this Court that: ". . . there is still a widespread belief, grounded on present conditions that the law should not force or encourage testimony which might alienate husband and wife or further enflame existing domestic differences." *Id.* at 78-79. Indeed, *Hawkins* does no more than confirm the "*natural repugnance* in every fair-minded person to compelling a wife or husband to be the means

of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner." 8 *Wigmore* § 2228 at 217.

In ordering Mrs. Rovner to furnish handwriting samples to the federal grand jury for use in its investigation of her husband, the District Court[1] relied upon cases[2] where one spouse had voluntarily and *extra-judicially* become the source of evidence against the other, which was later adduced at trial through someone else. But none of the cases cited had anything at all to do with the situation here where the question is whether one spouse can be called as a witness and judicially compelled to give evidence directly[3] against the other.

The District Court also found comfort in the fact that handwriting samples can be judicially compelled without violating the Fifth Amendment privilege against compulsory self-incrimination and opined that "[I]t is inconceivable that an act which would not make one a witness against himself would make him a witness against another" (App. B, p. 8). The analogy is misdrawn, for the Fifth Amendment has long been held to protect against nothing more than compelled communications or testimony. Identifiable physical characteristics such as hand-

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1. The Court of Appeals merely affirmed the judgment of the District Court without adopting its opinion or expressing reasons of its own.

2. *United States v. Mackiewicz*, 401 F.2d 219 (2nd Cir. 1968); *United States v. Winifree*, 170 F. Supp. 659 (E.D. Pa. 1959); *Hilliard v. United States*, 121 F.2d 992 (4th Cir.), *cert. denied*, 314 U.S. 627 (1941).

3. While generally seen in the context of a criminal trial, the marital privilege has been uniformly held to be available to a witness during grand jury proceedings. *Nanfito v. United States*, 20 F.2d 376 (8th Cir. 1927); *United States v. Weinberg*, 439 F.2d 743 (9th Cir. 1971); *United States v. George*, 444 F.2d 310 (6th Cir. 1971).

writing, fingerprints or blood type were never considered to be within its protection. *Schmerber v. California*, 384 U.S. 757 (1966); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973). But, the marital privilege has no similar history or purpose, and the marital relation cannot be expected to fare better because a wife's judicially-compelled handwriting is used against her husband rather than her verbal testimony.

In summary, Mrs. Rovner has been confronted with a Hobson's choice. She must either give the grand jury samples of her handwriting which may well lead to her husband's indictment, or she must go to jail for the life of the grand jury. In either event, the Rovner "family peace" will have been shattered for a long time to come. The marital privilege exists to prevent just such a confrontation, for no wife should ever be judicially required to lift a finger, let alone her whole hand, to help her husband's prosecutors.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DONALD J. GOLDBERG
Counsel for Petitioner

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: MISCELLANEOUS NO. 74-143

GRAND JURY PROCEEDINGS
SUSAN ROVNER, WITNESS

MEMORANDUM AND ORDER

Newcomer, J. June 14, 1974

A grand jury investigating one Robert Rovner has subpoenaed his wife, Susan Rovner, to obtain from her handwriting and/or handwriting samples. Mrs. Rovner refuses to comply with the subpoena, claiming that by giving handwriting samples she would be violating her privilege against testifying adversely to her husband. For the reasons stated below, we find the marital privilege to be inapplicable here and we will grant the government's motion to enforce the subpoena.

The marital privilege being asserted is the privilege against one spouse becoming an adverse witness against the other, *Hawkins v. United States*, 358 U.S. 74, 75 (1958), not, as Mrs. Rovner claims, against one spouse being used as the source of evidence against the other. The privilege has not been upheld when evidence provided by one spouse is introduced against the other by means other than the testimony of that spouse. United States v. Mackiewicz, 401 F. 2d 219 (2d Cir. 1968); United States v. Winifree, 170 F. Supp. 659, (E.D. Pa. 1959); Hilliard v. United States, 121 F. 2d 992 (4th Cir.), cert. denied 314 U.S. 627 (1941). Mrs. Rovner is not being called to testify and thus cannot properly claim the privilege's protection.

Even assuming that a spouse's incompetency to be a witness against the other spouse encompasses more than incompetency to testify against that spouse, it is clear that, were Mrs. Rovner the object of the grand jury investigation rather than her husband, the furnishing of the type of evidence which is sought here would not convert Mrs. Rovner into a witness against herself. Gilbert v. California, 388 U.S. 263 (1967). It is inconceivable that an act which would not make one a witness against himself would make him a witness against another.

APPENDIX B

REJC: RRG: gai
File 74-0969

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:
GRAND JURY PROCEEDINGS
SUSAN ROVNER, WITNESS

MISCELLANEOUS NO. 74-143

ORDER

AND NOW, this 20th day of June, 1974, Susan Rovner having appeared before the Court and having refused to submit and furnish samples of her handwriting and handprinting in violation of this Court's Order of June 19, 1974, it is hereby

ORDERED, ADJUDGED, and DECREED

that the said Susan Rovner is adjudged in civil contempt of this Court and is committed to the custody of the United States Marshal until such time as she purges herself by submitting and furnishing samples of her handwriting and handprinting.

BY THE COURT:

CLARENCE C. NEWCOMER, J.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1652

IN RE: GRAND JURY INVESTIGATION
SUSAN ROVNER, *Witness*
SUSAN ROVNER, *Appellant*

Appeal from Judgment and Sentence for Contempt of the United States District court for the Eastern District of Pennsylvania—D.C. Misc. No. 74-143

Argued: July 18, 1974

Before: KALODNER, HUNTER and ROSENN, *Circuit Judges*

Joel H. Slomsky, Esq.
915 Robinson Bldg.
Phila., Pa. 19102

Donald J. Goldberg, Esq.
1420 Two Girard Plaza
Phila., Pa. 19102

Attorneys for Appellant

Robert E. J. Curran
United States Attorney

Richard R. Galli
Assistant U.S. Attorney

Walter S. Batty, Jr.
Assistant U.S. Attorney

Attorneys for Appellee

JUDGMENT ORDER

Appellant, Susan Rovner, was subpoened to testify before a federal grand jury. She appeared as requested, was informed by government counsel that her husband

was the subject of the grand jury's investigation, and was asked to provide samples of her handwriting and handprinting to assist the grand jury in its investigation. She declined to provide the exemplars, relying for her refusal upon the marital privilege not to testify or furnish evidence in any form.

In view of appellant's refusal, the U.S. Attorney requested the district court to order appellant to provide the handwriting exemplars. The district court held that appellant was "not being called to testify and thus cannot properly claim" the protection of the marital privilege.

Appellant persisted in her refusal to furnish the exemplars. Following a hearing, the district court adjudged appellant in civil contempt and she took this appeal. The sole issue raised on appeal is whether the marital privilege protects a wife from being judicially compelled to furnish handwriting exemplars to a federal grand jury for use in an investigation directed against her husband.

After careful consideration of the contentions made by counsel for appellant, both in his brief and in oral argument, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

Dated: July 25, 1974 ATTEST:

Clerk

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1652

IN RE: GRAND JURY INVESTIGATION
SUSAN ROVNER, *Witness*
SUSAN ROVNER, *Appellant*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, KALODNER, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by
Susan Rovner, Appellant,

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Judge

Dated: August 27, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-325

SUSAN ROVNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that she was improperly adjudged in civil contempt for having refused to supply a grand jury with handwriting exemplars.

After having refused to comply with a grand jury subpoena, in violation of a court order to do so, petitioner was adjudged in civil contempt in the United States District Court for the Eastern District of Pennsylvania. She was ordered committed to custody until she should purge herself of the contempt (Pet. App. B, p. 9). The court of appeals affirmed (Pet. App. C, pp. 9-10).

A grand jury in the Eastern District of Pennsylvania had subpoenaed petitioner in connection with an investigation of her husband and demanded that she supply exemplars of her handwriting and hand printing. Peti-

tioner appeared, but upon being informed that her husband was the subject of the investigation, she declined to give the handwriting samples, claiming her marital privilege as justification. The government moved to enforce the subpoena, and the district court granted the motion, holding the marital privilege inapplicable to non-testimonial evidence and finding that, in any case, no privilege applied to the type of evidence sought (Pet. App. A, pp. 7-8). Despite the district court's order, petitioner persisted in her refusal to supply handwriting exemplars, and she was consequently adjudged in civil contempt (Pet. App. B, p. 9).

The grand jury subsequently returned an indictment against petitioner's husband, charging him in three counts with violations of 18 U.S.C. 1951, 26 U.S.C. 7201, and 26 U.S.C. 7206(1) (*United States* v. *Robert A. Rovner*, Cr. No. 74-602, E.D. Pa.). In light of this indictment, the government moved to vacate the civil contempt order against petitioner. We are advised that the government's motion to vacate was granted November 13, 1974. We submit, therefore, that this case is now moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.